Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2006 JAN 30 PM 3:52
BY

IMMUNOCEPT, LLC, PATRICE ANNE LEE, and JAMES REESE MATSON,
Plaintiffs,

-vs- **Case No. A-05-CA-334-SS**

FULBRIGHT & JAWORSKI, LLP,
Defendant.

ORDER

BE IT REMEMBERED on the 24th day of January 2006, the Court reviewed the file in the above-styled cause, and specifically Defendant Fulbright & Jaworski, LLP's Motion for Protective Order, or, Alternatively, to Compel Deposition of Plaintiffs' Expert Witnesses, or, Alternatively, for Modification of Scheduling Order [#25] and Defendant's Emergency Supplement thereto [#26]. In light of the expedited nature of the relief sought in the foregoing documents, the Court conducted a telephone conference with counsel for each of the parties the same day. Having considered the motion, the supplement, the arguments of counsel at the telephone conference, the relevant law, and the case file as a whole, the Court confirms its oral announcements with the following written opinion and order.

This is a legal malpractice case involving allegations of negligence in the prosecution of a patent for a medical device. The motion presently before the Court concerns a disagreement between the parties over the sequence in which certain depositions are to be taken. Although the scheduling order in this case set November 14, 2005 as the date for Plaintiffs' designations of expert witnesses,

32

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it appears that an agreement to extend this deadline was reached by the parties, and Plaintiffs served their expert designations on Fulbright on December 19, 2005. Soon thereafter, Fulbright contacted Plaintiffs about arranging dates for depositions of their expert witnesses. Plaintiffs indicated to Fulbright that one of its witnesses—Dr. Rinaldo Bellomo, who Fulbright describes as Plaintiffs' "key expert witness"—would not be available for deposition until February 21, 2006. Because this date fell eight days after the close of discovery and one day after the dispositive motions deadline set by the scheduling order in this case, Fulbright was initially reluctant to accept it. However, Fulbright eventually accepted the late date as an accommodation to Plaintiffs.

Since that time, Plaintiffs have served four subpoenas on Fulbright, each of which requires Fulbright's expert witnesses to appear for deposition before the deposition of Dr. Bellomo will have taken place. Two of these experts—Dr. David Tweardy and Dr. John Kellum—are expected to provide testimony that directly rebuts Dr. Bellomo's opinions. The other two—Phil Phillips and Dr. Keith Ugone—are expected to rebut the testimony of Martha Feldman and James Malackowski, whom Plaintiffs have designated to offer opinions regarding the FDA approval process and damages. According to Fulbright, Feldman and Malackowski each rely on the opinions of Dr. Bellomo, and thus, the ability of Phillips and Dr. Ugone to rebut the testimony of these two witnesses is dependent on Dr. Bellomo's own opinions and testimony.

Plaintiffs argue that they should not be forced to wait to depose Fulbright's witnesses until after Dr. Bellomo's deposition has been taken. According to Plaintiffs, each of Fulbright's witnesses is expected to testify about a variety of matters, among which the issues relevant to Dr. Bellomo's opinions are but one small part. Plaintiffs do not dispute, however, that each of Fulbright's witnesses' testimony will be affected, at least in some measure, by the further explication of Dr.

Bellomo's opinions that will take place at his deposition. Thus, in fairness, Fulbright should be permitted to take the deposition of Dr. Bellomo before these witnesses are deposed.[1]

Accordingly:

IT IS ORDERED that Defendant Fulbright & Jaworski, LLP's Motion for Protective Order, or, Alternatively, to Compel Deposition of Plaintiffs' Expert Witnesses, or, Alternatively, for Modification of Scheduling Order [#25] is GRANTED in that Plaintiffs may not take the depositions of Dr. David Tweardy, Dr. John Kellum, Phil Phillips, or Dr. Keith Ugone until after Defendant has had the opportunity to depose Dr. Rinaldo Bellomo.

SIGNED this the 27th day of January 2006.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

[1] As the Court noted at the telephone conference, Plaintiffs have little room to complain about the difficult predicament the Court's ruling places them in with respect to the remaining deadlines in the case, as it was their decision to designate an expert who could not be made available for deposition until after the close of discovery.